SUPREME COURT OF THE UNITED STATES.

Nos. 238 and 304.—October Term, 1928.

238 The United States, Petitioner, vs. The New York Central Railroad Company, Lessee of the Boston and Albany Railroad.

304 The United States, Petitioner, vs. Nevada County Narrow Gauge Railroad Company.

On Writs of Certiorari to the Court of Claims.

[March 11, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

On February 25, 1921, and June 30, 1921, the respondent railroads respectively filed applications with the Interstate Commerce Commission for a readjustment of the compensation for services in carrying the mails rendered by them, from dates before the applications and for the future. The Commission at first expressed an opinion that it had 'authority to establish rates only for the future' but made orders establishing rates as fair and reasonable after the date of the orders. On further hearings however it made new orders establishing the same rates as fair and reasonable for the times between the filing of the applications and the orders previously made. 85 I. C. C. 157. 95 I. C. C. 493. See 144 I. C. C. 675. The railroads applied to the Postmaster General for payment as ordered by the Commission, but their applications were refused. Thereupon they sued in the Court of Claims and got judgments for compensation computed according to the last orders of the Commission. 65 Ct. Cls. 115. The United States asked and obtained a writ of certiorari from this Court.

The ground taken by the United States is that the Interstate Commerce Commission had been given no authority to change the

rates of payment to be received by the railroads for any time before its orders went into effect. The question is one of construction which requires consideration not of a few words only but of the whole Act of Congress concerned. This is the Act of July 28, 1916, c. 261, § 5; 39 St. 412, 425-431 (C., Tit. 39, ch. 15, where the long § 5 is broken up into smaller sections) which made a great change in the relations between the railroads and the Government. Before that time the carriage of the mails by the railroads had been regarded as voluntary, *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, now the service is required (C., Tit. 39, § 541); refusal is punished by a fine of $1,000 a day (C., Tit. 39, § 563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation. The words are "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." The Government admits, as it must, that reasonable compensation for such required services is a constitutional right. So far as the Government has waived its immunity from suit this right may be enforced in the absence of other remedies not only by injunction against further interference with it but by an action to recover compensation already due. Accordingly the statute provides for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. C., §§ 542, 551, 554.

We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78. But the filing of an application expresses a present dissatisfaction and a demand for more. A further protest would be a superfluous formality. If the claim of the railroads is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, 'If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the com-

pensation with one hand, while they apply the axe with the other.' *Parks* v. *Boston*, 15 Pick. 198, 208. In fact the necessary investigation takes a long time, in these cases, years, but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. This being so, and the Interstate Commerce Commission being the tribunal to which the railroads are referred it is a natural incident of the jurisdiction that it should be free to treat its decision as made at once. Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings before the Commission, when the Commission has had that very question before it and has answered it at least from the date of its orders. We are quite aware that minutiae of expression may be found that show Congress to have been thinking of the future. We put our decision not on any specific phrase but on the reasonable implication of an authority to change the rates of pay which existed from the day when the application was filed, the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the fact that unless the Commission has the power assumed a part of the railroads' constitutional rights will be left in the air.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

INDEX

	Page
Opinion below	1
Jurisdiction	2
The question	2
Statutes	2
Statement	6
Specification of assigned errors to be urged	9
Summary of argument	10
Argument:	
I. The fair import of the words of the statute shows that Congress intended that the commission's order increasing rates should operate prospectively	12
II. A forced construction of the statute is not made necessary by constitutional difficulties	18
Appendix: Section 5 of the act of July 28, 1916 (39 Stat. 412, 425, 431)	29–42

CITATIONS

Cases:

Aetna Insurance Co. v. Hyde, 275 U. S. 440	22
American Smelting & Refining Co. v. United States, 259 U. S. 75	20
A. T. & S. F. Ry. Co. v. United States, 225 U. S. 640	20
Banking Co. v. Lampley, 76 Ala. 357	20
Benton v. Belt Line Ry., 268 U. S. 413	21
Boston & Worcester R. R. Corporation v. Western Railroad Corporation, 14 Gray 253	17
Chic. & Alton Ry. Co. v. United States, 49 Ct. Cls. 463	20
C., M. & St. P. Ry. Co. v. United States, 198 U. S. 385	20, 26
Chic., Mil. & St. P. Ry. Co. v. Public Utility Com., 274 U. S. 344	23
Colorado Power Co. v. Halderman, 285 Fed. 178	23
Dayton-Goose Creek Ry. v. United States, 263 U. S. 456	22
Delaware, L. & W. R. R. v. United States, 249 U. S. 385	20
Eastern Railroad Co. v. United States, 120 U. S. 391	20, 26
Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285	23
Hackworth v. Missouri S. R., 15 A. L. R. 170	23
K. C., M. & O. Ry. Co. v. United States, 53 Ct. Cls. 258	20
Love v. A., T. & S. F. Ry. Co., 185 Fed. 321	23

Cases—Continued. Page

Mail Divisor Cases, 251 U. S. 326 20

Minn. & St. Louis Ry. Co. v. *United States*, 24 Ct. Cls. 350 .. 26

N. Y., N. H. & H. R. R. v. *United States*, 251 U. S. 123 ..... 20, 26

Norfolk & Western Ry. v. *West Va.*, 236 U. S. 605 23

Northern Pac. Ry. v. *North Dakota*, 236 U. S. 585 22

Northern Pac. Ry. v. *Solum*, 247 U. S. 477 23

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196 23

Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587 23

Vandalia R. R. v. *Schnull*, 255 U. S. 113 22

Statutes, etc.:

Act of March 3, 1873, c. 231, 17 Stat. 556, 558 16

Act of July 12, 1876, c. 179, 19 Stat. 78, 79 16

Act of June 17, 1878, c. 259, 20 Stat. 140, 142 16

Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212 16

Act of July 28, 1916, c. 261, sec. 5, 39 Stat. 412, 429; U. S. C. Title 39, secs. 524-568 2-6

Cong. Rec., vol. 53, pt. 10, 64th Cong., 1st sess., p. 9694 17

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 238

THE UNITED STATES, PETITIONER,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, LESSEE OF THE BOSTON & ALBANY RAILROAD

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 24) is reported in 65 Ct. Cls. 115. The opinion of the Interstate Commerce Commission is reported in 104 I. C. C. 521. Its other decisions in the mail pay cases under this statute are reported in 56 I. C. C. 1; 85 I. C. C. 157; 95 I. C. C. 204; and 144 I. C. C. 675.

JURISDICTION

The judgment of the Court of Claims was entered April 2, 1928. (R. 30.) Petition for certiorari was filed June 30, 1928. The jurisdiction of this Court rests on the Act of February 13, 1925.

THE QUESTION

The question presented is whether under the provisions of Section 5 of the Act of July 28, 1916 (c. 261, 39 Stat. 412, 429; U. S. C. Title 39, Sections 524–568), the Interstate Commerce Commission in fixing rates to be paid by the United States for carrying the mails on railroads, and for the services connected therewith, has authority by the terms of the statute to make its order increasing rates operate retroactively, so as to require a readjustment of the charges paid between the date of the filing of the carrier's petition for increase and the date of the order for an increase.

STATUTES

Section 5 of the Act of July 28, 1916, is set forth in the appendix. Its most pertinent provisions are as follows:

> Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the

manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the

same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

The procedure for the ascertainment of said rates and compensation shall be as follows:

Within three months from and after the approval of this Act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

* * * * *

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and ren-

der service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as now provided by law for other hearings between carriers and shippers or associations.

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

* * * * *

At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings

shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

* * * * *

The existing law for the determination of mail pay, except as herein modified, shall continue in effect until the Interstate Commerce Commission under the provisions hereof fixes the fair, reasonable rate or compensation for such transportation and service.

* * * * *

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense. (39 Stat. 429–431.)

STATEMENT

This action was brought by the respondent in the Court of Claims to recover compensation for carrying mails for the period between February 25, 1921, and December 13, 1923, additional to the compen-

sation already paid for that period, at the rates prescribed by orders of the Interstate Commerce Commission in effect during the period. Acting pursuant to the authority granted by Section 5 of the Act of July 28, 1916, to fix fair and reasonable rates to be paid by the United States for the transportation of mail matter by railroads, the Interstate Commerce Commission under date of December 23, 1919 (R. 8), made an order establishing such rates. On February 25, 1921 (R. 21), the respondent, with other carriers, filed an application for readjustment of these rates, and requested the Commission to readjust them for the period after September 1, 1920.

The Commission undertook the inquiry, and the operations of the carriers for the month of June, 1921, were used as a basis. (R. 21.) After extended hearings, the case was submitted to the Commission November 25, 1922, and was decided December 13, 1923. (85 I. C. C. 157.) It dealt with the carriers in groups, not singly, and its computations and determinations as to just and reasonable rates dealt with groups of carriers. It ordered an increase, determining what were "fair and reasonable rates to be received on and after December 13, 1923," the date of the order. (R. 12.) With respect to the carriers' request that the increase be made retrospectively operative from September 1, 1920, or from February 25, 1921, the Commission said: "We

have authority to establish rates only for the future and not for the past." (R. 22.) The decision of the Commission was unanimous.

The new rates went into effect as of the date of that order, December 13, 1923, and the dispute here relates to the period between February 25, 1921, the date of the filing of the petition for increase, and December 13, 1923. For service rendered during that period the carriers accepted pay at the rates then prescribed without, so far as disclosed, any protest other than the filing with the Commission of the petition for increase under the terms of the statute. The carriers filed with the Commission a petition for reargument on the question of making the order retrospective in its operation, and on January 12, 1925 (95 I. C. C. 204), the Commission filed a report making a finding that the rates of mail pay fixed in its order of December 13, 1923, for future operations were fair and reasonable rates for the service rendered after February 25, 1921, but it made no order that those rates should be paid for service prior to December, 1923.

Again the question was reargued, and on December 8, 1925 (104 I. C. C. 521), the Commission filed an opinion and made an order (R. 13) going one step further and ordering that the rates it had fixed in its decision of December 13, 1923, should be the rates of pay to be received for transportation of the mails from February 25, 1921, the date the petition for increase was filed. Four of the Commissioners dissented. The roads, including the respondent,

made demand on the Postmaster General for the retrospective additional pay (R. 16), who referred the matter to the Comptroller General, who held that under the terms of the Act of July 28, 1916, the order of the Commission made in 1919 fixing the rates of mail pay continued in force until changed by the Commission in December, 1923, and that there was no authority in law for retrospectively increasing the compensation for service prior to the Commission's order of December 13, 1923. (R. 17.) Thereupon the respondent brought this suit, based on the order of the Commission, to recover the difference between what it had been paid for transportation of mail between February 25, 1921, and December 13, 1923, and the rates fixed in the Commission's order of December, 1923. Special findings of fact made in the Court of Claims included no independent findings by the court as to reasonable rates, but merely set forth the proceedings and orders of the Commission.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

I. The Court of Claims erred in holding that the Commission had power to make an order for increase of rates operate retroactively from the date of filing the petition.

II. The Court of Claims erred in granting judgment for the increased rates for the period between the date of the filing of the petition for increase and the date of the commission's order granting an increase.

SUMMARY OF ARGUMENT

I. The question is as to the intention of Congress and is one of statutory construction. The Commission's authority is limited by the Act. The terms of the statute show that the orders were to operate prospectively. It is provided that an order shall continue in force until changed by the Commission; that the rates fixed are those "to be received," and that they shall be paid "during the continuance of the order." The Act further provides that the Commission shall proceed as if determining rates for private shippers and under the Commerce Act the Commission has no authority to make or allow retrospective increases.

The Act expressly authorized a retrospective readjustment at the time of the first rate order made by the Commission of rates fixed by law at the time of the passage of the Act. The expression of such power to readjust excludes the power to make retrospective orders subsequently.

The intention of Congress is further disclosed by the legislative practice for many years of providing for periodic readjustments of railway mail pay, always prospective and not retrospective in their operation. The Congressional Record supports the contention that Congress understood these orders were to operate prospectively

II. So construed, the statute is not invalid as to all cases, nor is it shown that confiscation occurred here. Prior to the Act of July 28, 1916, Congress

had not asserted the power to compel railroads to carry mail or to fix the pay. Although transportation of mails seems to be a service which could reasonably be exacted from a common carrier as such, and is no more specialized than many other kinds of modern service rendered, the decisions proceed on the theory it is not a common carrier service. It is not important here, whether the power to compel the service results from the fact that the railroads are common carriers, or is incident to the power to establish post roads, or is an exercise of the power of eminent domain. In any case the railroads may be required to carry the mails provided just compensation is paid.

The fair and reasonable rates authorized by this Act, as in the case of rates applicable to private shippers, may be more than those necessary to avoid confiscation. It does not follow from the findings of the Commission that the respondent was subjected to confiscatory action by the rates in effect pending the hearing. The Commission's findings relate to groups of carriers, and on them no one carrier may show confiscation.

A statute that requires a public utility to obtain consent of a public commission to increase rates is not necessarily invalid because some time may elapse between the application for and the granting of relief. The Commerce Act allows suspension of increases for a reasonable time, with no provision for retrospective increase. Many State statutes have similar provisions. No system of rate regula-

tion or adjustment keeps up with the necessity for increases or decreases. Adjustments lag behind the need for them. If there be undue delay in granting relief the courts will grant it, where the utility is operating under confiscatory rates. These carriers could have refused to transport the mails at confiscatory rates, and, on proper showing, resisted the enforcement of the rates, and the Postmaster General could have kept the mails moving by exercising his statutory authority to contract for temporary higher rates than those established in the Commission's orders. The acceptance by the carriers of the mail offered and the acceptance of the compensation paid, without "saving the question of price" other than by filing a petition for relief, amounted to an agreement to carry the mails at the existing rates subject only to such readjustment as under the terms of the statute, properly construed, the Commission could make.

ARGUMENT

I

THE FAIR IMPORT OF THE WORDS OF THE STATUTE SHOWS THAT CONGRESS INTENDED THAT THE COMMISSION'S ORDER INCREASING RATES SHOULD OPERATE PROSPECTIVELY

The question presented in this case is one of statutory construction. Our efforts should be to ascertain the intention of Congress. The Commission may not act beyond the authority which Congress intended to confer upon it.

Resort must be had to the words used.

The Commission was authorized to fix fair and reasonable rates

> from time to time * * * prescribing the method or methods by weight, or space, or both, * * * and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

This plainly provides that the old order shall continue in force until the new one is made, and that the old order shall govern the rate on transportation while it was in force. It is further provided that at the conclusion of the hearing the Commission

> shall establish by order a fair, reasonable rate or compensation *to be received, at such stated times* as may be named in the order, for the transportation of mail matter and the service connected therewith, and *during the continuance of the order* the Postmaster General *shall pay* the carrier * * * such rate or compensation. (Italics ours.)

These words show that the rate order was intended to operate only prospectively. If the respondent is right, the Commission has authority not only to adjust the rates retrospectively, but completely change the basis retrospectively.

Another provision in the statute is that "for the purposes of this section" the Commission was vested with the powers "it is now authorized by law to exercise in the investigation and ascertain-

ment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers." This and other provisions show that Congress intended the Commission to proceed along the same lines as when regulating rates for other service.

Under the Commerce Act the Commission has no power when ordering an increase in rates or when allowing an increase after suspension of an increased tariff filed by carriers to make the increase retrospective so as to apply to transportation service performed before the effective date of the order. There is no reason to believe Congress intended the Commission to act differently under this statute. Of course, where numerous private shippers are involved, it is impracticable to make a retrospective increase covering transportation already furnished and paid for. There may not be the same practical objection where the United States is the only shipper, although its postal rates may be affected by the existing rates for railway mail pay, but the words of the statute nevertheless negative the contention that Congress intended a different method to be applied than is followed under the Commerce Act.

Another significant provision is the one authorizing a retrospective readjustment at the time of the first order made by the Commission under the Act.

The Act prescribed, in the earlier parts of Section 5, the rates to be paid for some service in the transportation of mails. It also contained a clause

that the existing law for the determination of mail pay "except as herein modified, shall continue in effect until the Interstate Commerce Commission under the provisions hereof" acts. It provided with respect to the first decision to be made by the Commission under the Act:

> Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, * * * *Provided*, That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, *from the dates on which the rates named in this section became effective.* (Italics ours.)

It thus expressly provided for a retrospective readjustment on the basis of the first decision of the Commission. *Expressio unius est exclusio alterius.* The express authority to make a retrospective readjustment at the time of the first order, of rates not established after hearings, but imposed by law, negatives existence of a power to make retrospective the subsequent orders from time to time changing the rates or basis.

The legislative practice for many years prior to the Act of 1916 is also significant as to the intention

of Congress. For many years the law had provided for periodic readjustment of railway mail pay, to be operative not retrospectively, but from the date the readjustment was made. (Act of March 3, 1873, c. 231, 17 Stat. 556, 558; Act of July 12, 1876, c. 179, 19 Stat. 78, 79; Act of June 17, 1878, c. 259, 20 Stat. 140, 142; Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212.)

Where the established practice had been to make readjustments entirely prospective, it is reasonable to suppose that Congress had that practice in mind when enacting this statute.

The provision in the Act of July 28, 1916, for hearings before the Interstate Commerce Commission, was an amendment to Section 5 of the Post Office Appropriation Act, introduced by Senator Cummins after the bill left the Senate Committee. There is therefore nothing in either House or Senate Committee Reports on the subject, and the conference committee report does not touch this question.

This part of Section 5 was known as the Cummins amendment, and he propounded and explained it to the Senate, much as the Chairman of a reporting committee does. There is no suggestion anywhere in the Congressional Record that retrospective readjustments were contemplated, and there are intimations to the contrary. Senator Cummins said:

> My amendment puts the Government of the United States in the hands of the Interstate Commerce Commission, precisely as we put every citizen of the United States in the hands of that Commission, and when the

> Commission declares what is reasonable compensation it binds not only the railway companies but binds the United States as well, and that is thereafter the compensatian to be paid for the service rendered. (Cong. Rec., Vol. 53, Part 10, 64th Cong., 1st Sess., p. 9694.)

There is no doubt that Congress intended that the Commission in allowing increases for railway mail pay should act as it does when allowing increases in rates for other transportation without retrospective operation on service rendered.

The respondent cites the case of *Boston & Worcester R. R. Corporation* v. *Western Railroad Corporation*, 14 Gray 253, as an authority for construing this statute to allow a retrospective order. That case related to charges to be made by one carrier for service rendered by it to another. It was similar to a division case. Compensation was to be adjusted by contract, and failing agreement by commissioners. The existing contract expired by limitation and the parties were unable to agree, and the commissioners were appealed to and made the award. Unless the award was made retrospective from the date of the expiration of the contract, there was no basis for adjusting the compensation for the period between the date of the expiration of the contract and the date of the award. In that respect the situation differed from that here, where the statute expressly provides for a continuation of the old rates until the new order is made.

In the brief of the United States supporting the petition for certiorari we stated that the statute is

susceptible of the construction placed upon it by the Court of Claims. Further reflection, in the light of the considerations above mentioned, leads to the conclusion that Congress intended that the orders of the Commission after the first should not result in any retrospective readjustments.

II

A FORCED CONSTRUCTION OF THE STATUTE IS NOT MADE NECESSARY BY CONSTITUTIONAL DIFFICULTIES

The original decision of the Interstate Commerce Commission that the increase should operate only on transportation service furnished after the date of the order was unanimous. With four commissioners dissenting, it reversed its former order, apparently influenced by the contention that constitutional difficulties existed as to its original interpretation of the statute. In a recent decision covering other groups of carriers, rendered July 10, 1928, 144 I. C. C. 675, it has again made a retrospective order increasing rates, with four commissioners dissenting, two of whom were not on the Commission at the time of the earlier decision. The dissenting opinions attached to the last decision are persuasive as to the proper interpretation of the statute.

There are no formidable constitutional objections to the construction petitioner contends for. They are not more serious than can be advanced against the Act construed as the respondent contends. There are no express provisions in the stat-

ute for judicial review. Even with the rate increase made retrospective to the date of the application for relief, the Act as applied in a particular case is open to assault on the ground that the rates retrospectively fixed by the Commission may be too low and confiscatory.

Furthermore, reasonable rates do not become unreasonable in a day; transition is gradual. As a practical matter, time will elapse between the date a rate becomes confiscatory and the date petition for relief is filed, and the Act as construed by the respondent affords no relief therefor.

There are a number of considerations which may be adduced to show that on this record confiscation is not shown during the period between the date of filing the petition for relief and the date of the Commission's decision and that the statute is not invalid on its face and to be expunged from the statute books even though it may operate in individual cases to produce a confiscation, relief against which may be afforded in a court.

The respondent contends that the Act of July 28, 1916, requiring the carriers to furnish this service is an exercise of the power of eminent domain, and that anything short of the just compensation guaranteed by the Constitution for property taken for public use is confiscation. Prior to the passage of this statute Congress had enacted no legislation to compel railroads to carry mail. It had even proceeded on the theory that it had no such authority.

R. S. 3999 provided that if the Postmaster General was unable to contract for carrying the mail on a railway route at a compensation within the maximum rates fixed by law, he might arrange to carry the mail by horse express or wagons.

The history of the legislation on this subject is dealt with in 56 I. C. C. 1, 3, and in *Chicago & Alton Ry. Co.* v. *United States*, 49 Ct. Cls. 463, 467, 489. See also *The Mail Divisor Cases*, 251 U. S. 326. The decisions seem to proceed on the theory that the service is not a common-carrier service. *Banking Co.* v. *Lampley*, 76 Ala. 357; *Eastern Railroad Co.* v. *United States*, 129 U. S. 391, 394; *Chic., M. & St. P. Ry. Co.* v. *United States*, 198 U. S. 385, 389; *K. C., M. & O. Ry. Co.* v. *United States*, 53 Ct. Cls., 258; *A., T. & S. F. Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, L. & W. R. R. Co.* v. *United States*, 249 U. S. 385; *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123, 127. In the latter case it said:

> We think it must be treated as settled doctrine that prior to the Act of July 28, 1916, * * *—with the exception of certain roads aided by land grants—railroads were not required by law to carry the mails.

This meant, of course, that Congress had not exercised the power to require it. It may be too late to suggest that new duties may rest upon common carriers which changed conditions make proper and that the transportation of mails is properly as much a common carrier service which may be exacted of

carriers who have devoted their property to public transportation as many other specialized classes of service, now exacted of carriers. Whether the Act of 1916 may only be construed as an exercise of the power of eminent domain or whether the duty of carrying the mails is a carrier service which may reasonably be imposed on carriers by the United States under the Post Roads section of the Constitution, may not be a vital question here. We have no doubt that Congress under some provision of the Constitution has authority to exact the service, provided the United States pays just compensation.

Where Congress has assumed to exercise the power of eminent domain and provided for a commission or official determination of compensation in the first instance, it has usually provided that in case the compensation so determined is not acceptable, the property owner may resort to the courts. In the present case it evidently assumed that it was not exercising the power of eminent domain.

In any event, the assertion of the respondent that our construction of the statute renders it unconstitutional generally or in its operation in this particular case, is not convincing.

Just and reasonable rates to be fixed under the Commerce Act may be higher than those necessary to avoid unconstitutionality. In *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 423, the Court said:

> It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to

be just and reasonable, and not excessive or extortionate.

The Act we are concerned with contemplated that the Commission in fixing railway mail pay should fix fair and reasonable rates as understood under the Commerce Act. In that case it is true the Court construed the language of the finding of the Commission to mean that certain rates were confiscatory but there is no finding by the Commission in this case that the property of any particular road was confiscated by the rates in effect from February, 1921, to the date of the order. It does not always follow, therefore, because old rates are found not fair or reasonable, that they were confiscatory.

The findings only relate to groups of roads and to the average effect on the groups. The claim of confiscation as to a particular corporation may not be predicated on such findings. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440.

To prevent confiscation it is not necessary that the same rate of return should be allowed for every service performed, or that the rate of return allowed as to one commodity, if applied to all service, would produce a fair return on the entire business. For rates on one service to be confiscatory, it must appear it is being handled at a loss or without any substantial return. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585; *Vandalia R. R.* v. *Schnull*, 255 U. S. 113; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456; *Norfolk & Western Ry.* v.

West Va., 236 U. S. 605, 608; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utility Com.*, 274 U. S. 344; see note to *Hackworth* v. *Missouri S. R. Co.*, 15 A. L. R. 170, 185.

Furthermore, statutes which require public utilities to obtain permission from public utility commissions to increase rates are not invalid because in some instances time may elapse between the date relief is applied for and the date when it is granted. The Commerce Act itself allows the suspension of increases for as much as five months without any retrospective relief if the increase is ultimately allowed, but no one would contend that the Commerce Act was unconstitutional, because of that. Many State utility commission Acts require permission for increases without retrospective operation of the increased rates allowed. If there be undue delay in action by a commission under such circumstances and meanwhile confiscation occurs, a court of equity will grant relief by injunction against enforcement of the old rates.

Great Northern Ry. v. *Merchants Elevator Co.*, 259 U. S. 285, 291;

Northern Pacific Ry. v. *Solum*, 247 U. S. 477;

Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587;

Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196;

Love v. *A. T. & S. F. Ry. Co.*, 185 Fed. 321, 326;

Colorado Power Co. v. *Halderman*, 295 Fed. 178.

In the present case the carrier, if it believed its property was being confiscated pending action by the Commission on the application for increase, might have sought relief by injunction against the enforcement of the confiscatory rates pending decision by the Commission. Such action would not have resulted in stoppage of the mails. Section 5 provides:

> The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor.

This section would have enabled him to meet the refusal by the railroad to submit to a confiscatory rate pending action by the Commission by temporary contracts. Of course, all such proceedings are awkward and cumbersome. Congress might have attempted to avoid them by expressly providing that the Commission's orders, increasing or decreasing rates, should operate retrospectively from the date of the application for increase or decrease. To be consistent, it might have gone further and ordered the retrospective change back to the date when the previous rates became unreasonably high or low although before the date of application for increase or decrease, but it has not done so. The provision in the Interstate Commerce Act, providing for suspen-

sion of increases without retrospective relief to the roads, has not given rise to any serious difficulty. The trouble in this case seems to have been that exceptional delay occurred in the granting of the relief prayed for and the Commission seems to have been influenced by that fact in changing its view as to the construction of the statute.

The matter of adjusting rates is not an exact science. Under any system it is not possible to avoid periods of reasonable length during which existing schedules of rates are too high or too low. Their unreasonable character is usually demonstrated before application for relief is made. Readjustment lags behind the need for it. If the delays are not unreasonable, the inequalities are usually equalized in the long run. Congress, no doubt, assumed that the Interstate Commerce Commission would act with promptness in dealing with this subject.

If the statute is construed, as we contend it should be, so that the Commission's orders are only prospective in operation, the respondent is in no position to question the amount of compensation paid it while the proceeding was pending before the Commission. It contends that the power of eminent domain was being exercised and that obligatory orders for transportation of mail were given it. The Government specified the price to be paid when tendering the mail for carriage, and there is nothing in this record to show that the carrier made any protest beyond filing its petition for increase before

the Commission. Accepting the mail tendered and the pay prescribed by existing orders, it in effect consented to carry the mail at the prescribed rate, subject to whatever power the Commission might have *under the terms of the statute* to readjust its compensation. In other words, it failed "to save the question of price." *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78. See also *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123; *Eastern Railroad Co.* v. *United States*, 129 U. S. 391; *Minn. & St. Louis Ry. Co.* v. *United States*, 24 Ct. Cls. 350; *C., M. & St. P. Ry. Co.* v. *United States*, 198 U. S. 385. Its petition for relief before the Commission can only be taken as a request for such relief as the terms of the statute allowed.

A statute such as this is not unconstitutional as to all cases merely because it may operate in a particular case to produce confiscation if the rate in effect pending action by the Commission happens to be too low. If it were otherwise, to construe it to allow the Commission to make retrospective adjustments would not save it, because the rates thus fixed might be confiscatory.

The conclusion on this branch of the case should be:

(1) That the statute, as we construe it, is not unconstitutional on its face as to all cases.

(2) That it is not shown here to have produced an unconstitutional result in this case.

(3) That to provide for retrospective readjustment by the Commission would not render the statute less vulnerable constitutionally, since the courts may relieve against confiscatory rates when there is delay by the Commission, just as they may act if the rates fixed by the Commission are inadequate.

(4) In every case the carrier has its choice of accepting the existing rates pending action by the Commission, as it did here, or refusing the service and resorting to the courts for temporary relief.

It is evident that the constitutional objections do not justify a forced construction of the statute.

If unreasonable delays in readjustments of railway mail pay may be anticipated, Congress should be appealed to to modify the terms of the statute by allowing retrospective increases or decreases, to avoid making it necessary for the carrier to refuse the mails under alleged confiscatory rates and to resort to the courts, and to exact temporary increases under special contracts with the Postmaster General. However just intrinsically may seem to be the position of the carriers in these cases, the statute should be enforced according to its fair import.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1929.

JOSEPH STEWART,
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APPENDIX

SECTION 5 OF THE ACT OF JULY 28, 1916, 39 STAT. 412, 425–431

That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage car service, and closed-pouch service.

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorizations of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided.

Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars

may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided: *Provided*, That storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars.

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

The rates of payment for the services authorized in accordance with this section shall be as follows, namely:

For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding $2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and $2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided,* That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths.

For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit

is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service.

Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section.

The initial and terminal rates provided for herein shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance.

In computing the car-miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon.

In computing the car-miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless the car be

used by the company in the return movement, or otherwise mutually agreed upon.

New service and additional service may be authorized at not exceeding the rates herein provided, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require: *Provided*, That no additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor.

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. No pay shall be allowed for service by any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and specifications of the Post Office Department for such

type of cars, nor for service by any wooden full railway post-office car run in any train between adjoining steel cars, or between the engine and a steel car adjoining. After the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post-office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies hereafter shall be constructed of steel. Until July first, nineteen hundred and seventeen, in cases of emergency and in cases where the necessities of the service require it, the Postmaster General may provide for service by full railway post-office cars of other than steel or steel underframe construction, and fix therefor such rate of compensation within the maximum herein provided as shall give consideration to the inferior character of construction, and the railroad companies shall furnish service by such cars at such rates so fixed.

Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company using such property and not that of the other or terminal company: *Provided*, That service over land-grant roads shall be paid for as herein provided.

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when

required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper.

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper.

The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of this section for reduc-

tion in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company.

The provisions of this section shall apply to service operated by railroad companies partly by railroad and partly by steamboats.

The provisions of this section respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission.

Railroad companies carrying the mails shall submit, under oath, when and in such form as may be required by the Postmaster General, evidence as to the performance of service.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

The Postmaster General is authorized, in his discretion, to petition the Interstate Commerce Com-

mission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General.

The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service.

The Postmaster General is authorized to return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service.

The Postmaster General, in cases of emergency between October first and April first of any year, may hereafter return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space under the provisions of this section, to pay for the transportation thereof as provided for herein out of the appropriation for inland transportation by railroad routes.

The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and ad-

ministrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes.

Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to

fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same; and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

The procedure for the ascertainment of said rates and compensation shall be as follows:

Within three months from and after the approval of this Act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

The Postmaster General is authorized to employ such clerical and other assistance as shall be neces-

sary to carry out the provisions of this section, and to rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and to pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the commission a comprehensive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as now provided by law for other hearings between carriers and shippers or associations.

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the

Postmaster General, upon request of the commission, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days.

At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads

for transporting the mails and all service by the railroads in connection therewith.

The existing law for the determination of mail pay, except as herein modified, shall continue in effect until the Interstate Commerce Commission under the provisions hereof fixes the fair, reasonable rate or compensation for such transportation and service.

That the appropriations for inland transportation by railroad routes and for railway post-office car service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, are hereby made available for the purposes of this section.

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.